Supreme Court, U.S.
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No. 94-677

In The

Supreme Court of the United States

October Term, 1994

PETER P. NGHIEM,

Petitioner,

v.

NEC ELECTRONICS, INC., A CALIFORNIA CORPORATION; NEC CORPORATION (TOKYO), JAPAN (NIPPON ELECTRIC COMPANY), A JAPANESE CORPORATION; HIRO HASHIMOTO; H. YOSHIZAWA, DR.; GRANT HULSE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondents' arguments highlight why the Supreme Court should grant the petition. Respondents recognize that Petitioner's arguments on the arbitrary and capricious arbitration award, the lack of jurisdiction for lower Courts to confirm the award, and his constitutional right to due process have not been considered. Respondents also concede that the lower courts did not consider Petitioner's claim of fraud in the inducement to accept a binding arbitration clause embedded in the company handbook. Those issues should be resolved by this Court.

Respondents acknowledge that the antitrust violation issue was not resolved at arbitration. Furthermore, Respondents challenge Petitioner's claim of "contracts of employment" exception in 9 U.S.C. Section 1, and his standing to sue and allege antitrust violation under 15 U.S.C. Section 15. Those issues should likewise be decided here.

To disregard several material facts and arguments presented by Petitioner, Respondents rely on the general rule in *FSLIC v. Butler*, 904 F.2d 505, 509 (9th Cir.1990), that appellate court will not consider arguments which are not first raised before district court, absent a showing of exceptional circumstances. However, the specific exceptional circumstances exist in this case and they are clearly pointed out in Petitioner's briefs, on pages i and 8-11 (See also Appendix D, 24a-32a). Taking these extraordinary circumstances into consideration, this Court should review the obvious erroneous findings of facts made by the lower courts that led to a misruling of law to confirm the arbitrary and capricious arbitration award.

I. Grounds Presented Were Sufficient For Granting A Writ Of Certiorari Authorized By 28 U.S.C. Section 1254 Under Supreme Court Rule 10 And An Extraordinary Writ Authorized By 28 U.S.C. Section 1651(a) Under Supreme Court Rule 20.1.

Respondent overlooked the specific exceptional circumstances that warrant the exercise of the Court's

power to issue a writ of certiorari authorized by 28 U.S.C. Section 1254 and an extraordinary writ authorized by 28 U.S.C. Section 1651(a). The apparent intent of Petitioner's Counsel to deny him of the equal protection of the laws by deliberately withholding material facts and critical relevant arguments to influence the court decision,[1] is clearly a condition that is totally out of the ordinary course of events in judicial review (See Appendix D, 24a-27a). In addition, the lack of jurisdiction of the lower Courts to apply the Federal Arbitration Act, 9 U.S.C. Section 1 et seq., to confirm the award also constitutes exceptional circumstance.

By citing opposing cases, Respondents acknowledge the important questions in administration of Clayton Act and application of the exclusion provision in 9 U.S.C.

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[1] Realizing that his Counsel, David H. Tollner, had failed to timely file a motion to vacate the arbitration award, Petitioner wrote a letter to him on April 2, 1992 shortly after Petitioner received NEC's "Motion for Confirmation of Arbitration Award," dated March 18, 1992. In this memo, Petitioner highlighted the important material facts that should be presented to the Court (See Appendix H; Appendix D, 25a; and "Memorandum of Point and Authorities in Opposition to Defendant NEC Electronics, Inc.'s Motion for Confirmation of Arbitration Award . . . ," U.S. District Court Docket No. CV-92-20135 RMW (EAI), prepared by David H. Tollner). The unusual acts of Petitioner's Counsel in hindering and obstructing the due course of justice were further displayed in his refusal to do the oral hearing at the last minute in the Ninth Circuit after he had failed to file a motion to vacate the arbitrary and capricious arbitration award (See Appendix D, 24a and 26a). Taking advantage of the situation, Respondents submitted undignified arguments containing improper insinuations to mislead the Courts. These extraordinary circumstances allowed error to be compounded from the District Court to the Ninth Circuit and deprive Petitioner's right to due process. See *Weeks v. Weeks*, 556 So.2d 348 (Miss.1990).

Section 1 that gave grounds for this Court to grant certiorari. Thus, Petitioner has sufficiently presented special and important reasons for this Court to grant the petition under Supreme Court Rules 10 and 20.1.[2]

II. Exceptional Circumstances Shown In Petitioner's Briefs Are Basis For Raising Questions For The First Time On Appeals.

The exceptional circumstances cited by Petitioner that include the improper legal representation aggravated by the circumstantial procedural errors made by his Counsel and the lack of jurisdiction for the Courts to confirm the award, are basis for him to raise questions for the first time on appeals.[3] The Court in *Wesley v. Schneckloth*, 346 P.2d 658

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[2] Besides, "to implement a remedy for the violation of a recognized statutory or constitutional right" is a legitimate ground for the Court to exercise its supervisory power. See *United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir.1991).

[3] Petitioner who was entitled to have the irrational award vacated on the basis of fraud, undue means, witness perjury, manifest disregard of the law, and abuse of discretion and evident partiality of the arbitrator, raised the vacating arguments in the "Reply Brief of Appellant-Plaintiff" in the Ninth Circuit (See Appendix E, 54a-62a; Appendix F, paragraphs 9-21; and Appendix G, paragraphs 1-15). The argument on the exclusion provision in 9 U.S.C. Section 1 was also brought up in the same brief to question the lack of jurisdiction for the District Court to confirm the award under the FAA (See Appendix E, 39a-43; and Appendix D, 27a-31a). Although these questions are considered as new, they are all closely related to Petitioner's previous arguments. The question of lack of jurisdiction had been previously asserted under 9 U.S.C. Section 9 in the absence of an express, executed agreement for binding arbitration.

Under 28 U.S.C. Section 1447(c), "if at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." The Court in *Wesley v. Schneckloth*, 346 P.2d 658 (1959), stated that "any judgment

(1959) held that lack of jurisdiction to hear and determine a case meets the "exceptional circumstance" rule, and that evidence of lack of jurisdiction may be received for the first time and considered in an application for writ of habeas corpus.

Respondents argue that it was improper for Petitioner to raise questions of lower Courts' jurisdiction and his constitutional right to due process under the Fourteenth Amendment at the late stage. However, Respondents cited *U.S. v. Williams*, 112 S.Ct. 1735 (1992), where the Court granted certiorari to review a contention that was not advanced in either the District Court or the Court of Appeals by explaining that the fact that the issue was raised in a different case, is an adequate substitute for raising it in the case at hand. By confirming the arbitrary and capricious arbitration award under the FAA, the lower Courts passed on the presented substantive issues including the jurisdiction and due process questions. Respondents had plenty of opportunities to debate Petitioner's due process arguments but they decided to ignore them for their convenience as they had done the same for several other arguments and material facts.

The Supreme Court has held that "it suffices for our purposes that the court below passed on the issue presented," *Stevens v. Department of Treasury*, 111 S.Ct. 1562, 1567 (1991); cf. *Cohen v. Cowles Media Co.*, 111 S.Ct. 2513, 2517 (1991), "particularly where the issue is, 'in a state of evolving definition and uncertainty,' " *St. Louis v. Praprotnick*, 108 S.Ct. 915, 922 (1988) (plurality opinion), quoting *Newport v. Fact Concerts, Inc.*, 101 S.Ct. 2748, 2749 (1981),

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entered by constitutional court not having jurisdiction is void ab initio and is in legal effect no judgment at all." See also *McDougald v. Jenson*, 786 F. 2d 1465, 1486 (11th Cir.1986); *Cathcart-Maltby-Clearview, Etc. v. Snohomish*, 634 P.2d 853; *State ex rel. Pioli v. Higher Education Personnel Board*, 558 P.2d 1364, 1367 (1976).

"and one of importance to the administration of federal law." *Virginia Bankshares, Inc. v. Sandberg*, 111 S.Ct. 2749, 2761 (1991); *Praprotnick, supra*, at 108 S.Ct., at 922-923. Accordingly, there is no obstacle for the Court to review the questions presented in this petition.

III. The Court Should Grant The Petition To Settle The Important Question Whether The Lower Courts Lack Jurisdiction To Confirm The Arbitration Award In Light Of The Exclusion Provision In 9 U.S.C. Section 1 Which Applies To The Employment Contract Of Petitioner, A Worker Engaged In Foreign And Interstate Commerce.

The issue of lack of jurisdiction for lower Courts to confirm the award in light of the exclusion provision in 9 U.S.C. Section 1 is ripe for resolution in this case (See Appendix E, 39a-43a; and Appendix D, 27a-31a). It is obvious that the FAA does not apply to Petitioner's contract of employment since he was a worker directly engaged in foreign and interstate commerce within the meaning of the exclusion provision. See *Copley v. NCR Corporation*, 394 S.E.2d 751 (1990, W.Va); *Rosen v. Transx LTD.*, 816 F.Supp. 1364 (D.Minn.1993); *Herring v. Delta Airlines, Inc.*, 894 F.2d 1020, 1023 (9th Cir.), 110 S.Ct. 1319 (1990). Contrary to Respondents' argument, the Court in *Bacashihua v. U.S. Postal Serv.*, 859 F.2d 405 (6th Cir.1988) ruled that the individual worker did not have to be personally engaged in interstate commerce to have his claim excluded from the FAA as long as he belonged to a "class of worker engaged in interstate commerce."

The lower Courts' application of the FAA to the instant case is clearly in conflict with the decisions of other courts of appeals. By citing opposing cases, Respondents concede that there is a split in the Circuits concerning the application of the exclusionary clause in 9 U.S.C. Section 1. The Court should grant the Petition to resolve this important federal issue.

IV. The Court Should Grant The Petition To Resolve The Lower Courts' Erroneous Findings Of Facts That Lead To A Grossly Misapplied Conclusion Of Law To Confirm The Arbitrary And Capricious Arbitration Award, And Therefore, Deprive Petitioner's Right To Due Process And Manifest Injustice.

The lower Courts misinterpreted Petitioner's intent in availing himself to arbitration while he was fraudulently induced to accept the binding arbitration clause embedded in the company handbook. The Courts have exclusive obligation to make findings of facts in contrast to rulings of law. Here, the conclusions of law were made by the lower Courts based on a skewed set of facts because of the exceptional circumstances. (See Appendix Appendix D, 24a-26a; Appendix E, 42a; F, G and H; and "Brief of Appellant-Plaintiff," Docket No.92-16155, 6:20-28 to 21:1-24). In quoting *Ralph Andrews Productions v. Writers Guild*, 938 F.2d 128 (9th Cir.1991) where the Court ruled that appellant, through his conduct, did not consent to allow arbitrator to bind him personally, Respondents tacitly concede that Petitioner's conduct, taken as a whole, did not constitute voluntary acceptance of the binding arbitration clause.

The Courts did not expressly consider Petitioner's basic contractual right to arbitrate according to the terms of his intent. See *Dean Witter Reynolds, Inc. v. Byrd*, 105 S.Ct. 1238 (1985). Petitioner should not be held to the terms of a binding arbitration contract for which he did not bargain, see *Western Employers Ins. Co. v. Jefferies & Co.*, 958 F.2d 258 (9th Cir.1992), particularly, when the binding arbitration clause was induced by fraud. *Telum, Inc. v. E. F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir.1988). The Courts' determination of Petitioner's implicit acceptance of the binding arbitration clause embedded in the company handbook is questionable in light of *O'Connor Co. v. Carpenters Local Union No. 1408*,

702 F.2d 824, 825-26 (9th Cir.1983), and *United Steelworkers of America v. Warrior & Gulf Navigator Co.*, 80 S.Ct. 1347, 1352 (1960).

Petitioner would have not availed himself to arbitration without the understanding of nonfinal and nonbinding arbitration against him. Petitioner believed that he was still entitled to a judicial review in the event the arbitration award was erroneous. In fact, Petitioner did everything he could to preserve his rights including the filing of a lawsuit in state court on June 10, 1991 over five months before the arbitrator rendered the award. Petitioner's conduct amply demonstrates an intent not to accept binding arbitration but to only use arbitration forum as a fact finding process for his causes of action in state court. The lower Courts obviously erred in concluding that Petitioner "sat idle while an arbitration decision was rendered" and he "voluntary initiated binding arbitration" (See Appendix H). Pursuant to Fed.R.Civil P.52(a), the lower Courts' findings of fact should be set aside because they are clearly erroneous. Therefore, this Court may amend or make additional findings on motion of Petitioner. Fed.R.Civil P.52(b).

V. The Court Should Grant The Petition To Consider The Question Whether Respondents Violated Antitrust Laws And Section 4 Of Clayton Act In Wrongfully Discharging Petitioner For Not Cooperating With Their Illegal Restraint Of Trade And Price Fixing Conspiracy, Which Was Not Resolved At Arbitration.

Respondents highlight the specific comments of the Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 105 S.Ct. 3346, 3357 (1985), showing why this Court could and should grant the petition, on page 15 of their Brief in Opposition. The *Mitsubishi* Court held that a party resisting arbitration may attack directly the validity of the arbitration agreement. See *Prima Paint Corp. v. Flood*

& Conklin Mfg. Co., 87 S.Ct. 1801 (1967). Moreover, the party may attempt to have the agreement set aside by showing that the agreement was (1) "[a]ffected by fraud, undue influence, or overweening bargaining power; (2) that "enforcement would be unreasonable and unjust"; or (3) that proceedings "in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court." *The Bremen [v. Zapata Off-shore Co.]* 92 S.Ct. [1907] at 1914, 1916, 1917 (1972). This quotation applies precisely to the instant case where such showing obviously exists and there is sufficient "basis for assuming the forum inadequate or its selection unfair." See *Mitsubishi, Id.*

Although the Ninth Circuit, in light of *Mitsubishi*, overruled its own precedent case *Lake Communications, Inc. v. ICC Corp.*, 738 F.2d 1473 (9th Cir.1984), in its decision on June 3, 1994, the instant case should not be affected because the binding arbitration contract itself was product of violation of antitrust laws, 15 U.S.C. Section 1 et seq. See *Armco Steel Co., L.P. v. CSX Corp.*, 790 F.Supp. 311 (D.D.C.1991). To cover up their antitrust violation, Respondents misrepresented the function and effect of the arbitration agreement as a mandatory fourth step of the NEC's problem resolution process to fraudulently induce Petitioner to submit his claims to binding arbitration. As a result, Petitioner initiated the antitrust claim at arbitration, but he then decided to reserve it for judicial review[4] by not arguing such facts because of the

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[4] The "Closing Brief" was prepared by Robert S. Kahn, Petitioner's Counsel at the end of arbitration (after the last hearing on May 31, 1991), who had carefully examined all the hearing transcripts and exhibits (See Exhibit A of the "Supplemental Excerpts of Records for Reply Brief of Appellant-Plaintiff" filed in the Ninth Circuit, Docket No. 92-16155). The antitrust issue was not addressed in this "Closing Brief." Petitioner thought that private arbitration was not the right forum

arbitrator's misconduct and the irregularities at arbitration (See Appendix F, 71a-75a; Appendix G, 79a-85a; and Appendix H). Parties may exclude selected issues from the scope of arbitration once they agree to arbitrate. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 105 S.Ct. 3346, 3354 (1985). Therefore, Petitioner's antitrust claim that was not resolved at arbitration, should be allowed to reach the jury where it belongs.

Petitioner's allegations regarding NEC's violation of antitrust laws and his standing to sue are sufficiently well pleaded to withstand a Fed.R.Civil P.12(b)(6) motion.[5] Respondents in challenging Petitioner's standing to assert an antitrust claim bring up a federal issue where there a split among federal courts. The Ninth Circuit has held that an employee subjected to retaliatory discharge and boycott for refusing to cooperate with price fixing conspiracy in violation of the Sherman Act has

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to discuss antitrust issue while the arbitrator presumed that it was abandoned. Besides, Petitioner had filed a lawsuit in state court with eleven causes of action including antitrust violation on June 10, 1991 shortly after the last arbitration hearing and five months before the Arbitrator, John Kagel, rendered the award on November 18, 1991.

[5] In an antitrust action, the complaint need only allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden by the antitrust laws. See *Lucas v. Bechtel Corp.*, 633 F.2d 757, 760 (9th Cir.1980). Petitioner's first amended complaint did state antitrust claims under Clayton and Sherman Acts and consequential injury although he had not been given reasonable opportunity to complete discovery and to present more elaborated factual support for his claims (See Petitioner's "First Amended Complaint" filed in state court on Feb. 5, 1992, attached as Exhibit A in the "Supplemental Excerpts of Record for Brief of Appellee-Respondent" filed in the Ninth Circuit, Docket No. 92-16155 and Appendix G, 85a-87a).

standing under Section 4 of Clayton Act[6] to sue for treble damages. *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 79 (9th Cir.1984), *cert. dismissed at request of parties*, 105 S.Ct. 1155 (1985). The instant case is very similar to *Ostrofe*. See also *Ashmore v. Northeast Petroleum*, 843 F.Supp. 759 (D.Me.1994); *Donahue v. Pendleton Woolen Mills, Inc.*, 633 F.Supp. 1423 (S.D.N.Y.1986). To resolve this important question in administration of Clayton Act, the Court should grant the petition.

CONCLUSION

For the foregoing reasons, and for the sake of justice and fairness, the petition for a writ of certiorari and/or an extraordinary writ should be granted.

DATED: November 30, 1994

Respectfully submitted,

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[6] Petitioner's argument on his standing under Section 4 of Clayton Act as a terminated employee who was retaliated for not cooperating with NEC's illegal restraint of trade and price fixing conspiracy, was originally raised in the "Brief of Appellant-Plaintiff" filed in the Ninth Circuit, Docket No. 92-16155, 30:19-26.

APPENDIX H

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April 2, 1992

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Re: Arguments and Exhibits to be Included in the Opposition to Confirmation of Arbitration Award, Dismissal, Summary Judgment and Summary Adjudication.

Nghiem vs. NEC Electronics Inc.
California Superior Court Case # 712367
U.S. District Court Case # C-92-20135 WAI (EAI)

Dear Mr. Tollner:

After reviewing the legal documents from NEC Electronics Inc. to remove the lawsuit from the Superior Court of the State of California to the U.S. District Court, I would like to take this opportunity to clarify a few certain facts that you can include in your arguments to oppose NEC's motion for confirmation of arbitration award, dismissal, summary judgment and/or summary adjudication.

NEC apparently attempted to cloud the issues to be ruled by the Court by not transferring the complete set of Plaintiff's complaint filed in the State Court to the Federal Court. NEC tries to mislead the Court to believe that there was a written agreement between Plaintiff and NEC

on binding arbitration, therefore, arbitration award should be confirmed and Plaintiff's complaint should be dismissed. Since NEC's tactics is to confuse the relevant issues and then present its arguments based on incomplete and unwarranted facts, it is critical for us to keep the case well outlined for the Court by submitting the "index of exhibits" and "list of chronological events", and several other important exhibits listed below:

"I"	Department of Fair Employment and Housing Complaint filed by Nghiem.
"A"	Original Employment Invention and Confidential Information Agreement signed by Nghiem.
"B"	Modified 1987 version of Agreement entitled Employment, Invention, Authorship, Proprietary Confidential Information, and Arbitration Agreement.
"17A-17F"	Memo from P. Nghiem to D. Mitchell (5/9/90) Re: Management Problems in Strategic Marketing Group.
"30-33"	Summary of "CAD/COT Strategic Marketing Activities" prepared by P. Nghiem (4/11/90).
"S4-S5"	Appeal to the California Unemployment Insurance Appeals Board (9/28/90).
"K"	Civil Rights Act of 1991 (Title I: Federal Civil Rights Remedies. Title II: Glass Ceiling).
"L"	Memo from P. Nghiem to David Weinberg, Director of Labor Services at AAA, cc. J. Kagel, D. Mitchell and R. Kahn (11/27/91). Re: Request for Trial Denovo [sic] and Plaintiff's Position on Arbitrator's ruling.

"M" Memo from P. Nghiem to Congressman Tom Lantos (12/6/91) Re: Employment Discrimination at NEC Electronics Inc.

"N" Memo from P. Nghiem to D. Weinberg (6/5/91) Re: Misrecording of Plaintiff's Testimony.

"O" NEC's Closing Brief at AAA arbitration signed by Grant Hulse, stamped 9/9/91.

"P" Transcripts of hearings on Employment Discrimination by Japanese-owned Companies in the United States held by the Employment and Housing Subcommittee of the Committee on Government Operations, U.S. House of Representatives, presiding by Congressman Tom Lantos.

Several decisive points that can be effectively incorporated into our Opposition to Summary Judgment are presented below:

1) Plaintiff signed an "Employment, Invention and Confidential Information Agreement" with NEC on 8/31/89 which did not contain an arbitration agreement provision as specified in paragraph 10 of the November 1987 modified version entitled "Employment, Invention, Authorship, Proprietary and Confidential Information, and Arbitration Agreement". Plaintiff refused to sign the November 1987 version because of the undoubtful language regarding to the employment at-will status and additional final and binding arbitration agreement. (See legal arguments of Robert Kahn on employment contract from p. 28 to p. 37 of Closing Brief at private arbitration.) It appears that the employment contract signed by Plaintiff, is the same old version signed by Thomas Mc. Dannald and Edward A. Neubauer.

2) In contrary to NEC's implication of the existence of a written agreement to final and legal binding arbitration between Plaintiff and NEC, there is no such "written provision" in the Employment Invention and Confidential Information Agreement signed by Plaintiff on 8/31/89 (Exhibit A). Therefore, arbitration award is not enforceable under the Federal Arbitration Act (9 U.S.C. section 1 & 2, et seq.) where "a written agreement to arbitrate in any contract involving interstate commerce . . . " is required as shown in the modified 1987 version of agreement entitled Employment, Invention, Authorship, Proprietary Confidential Information, and Arbitration Agreement, not signed by Plaintiff (Exhibit B).

3) The NEC Employee Handbook has never been designated as a "Contract of Employment". Even NEC admitted that it contains only company policies and procedures. Paragraph 11 of the signed Employment Invention and Confidential Information Agreement unambiguously prohibits NEC to incorporate the language of NEC Company Handbook into the "Contract of Employment". In the motion to make the arbitration award final and legally binding, NEC's attempt to incorporate the company handbook language to the "Contract of Employment" is inconsistent with its own written agreement with Plaintiff.

   Paragraph 11 of the signed "Contract of Employment" states:

   "11. Except as to any employment agreement designated as a "contract of employment", this agreement supercedes all previous understandings, if any, between the Company and me on the subjects contained herein. No terms or provisions of this Agreement shall be varied or modified by

> any prior or subsequent act of either me or the Company except that the Company and I may subsequently amend this agreement by written instruments that specifically refer to this agreement and that are executed in the same manner as this agreement."
> (Exhibit A)

Plaintiff and NEC did not sign any subsequent written agreement to amend or modify the signed written "Contract of Employment" dated 8/31/89.

4) Plaintiff did not make attempt to vacate or modify the arbitration ruling in court because Plaintiff did not agree to final and binding arbitration. Plaintiff had neither signed any written agreement nor verbally commit to final and binding arbitration (Exhibit A and B). Plaintiff only signed the receipts on 9/5/89 and 5/7/90 to acknowledge receipt of the NECEL handbooks which were distributed to every employee at NEC. Plaintiff went through arbitration because NEC did not provide any other means but the company problem resolution process which "is the only process by which an employee or terminated employee may pursue a complaint." (Exhibit S2: NEC Employment Handbook p. 5.2, paragraph 1).

5) Plaintiff, in good faith, attempted to exhaust all administrative procedures to resolve the wrongful termination, mistreatment and employment discrimination imposed by NEC. Plaintiff did not expect that NEC would provide incorrect information and false testimonies to the Unemployment Insurance Appeal Board and the Arbitrator to deprive his unemployment benefits and compensations. Plaintiff did not expect NEC's management to perjure themself under oath while they continued to slander

Plaintiff and destroy his career and personal welfare (Exhibit M, S4, S5, Plaintiff's Closing Brief at private arbiration p.4 to p.26 and Plaintiff's First Amended Complaint).

6) Plaintiff announced his position to NEC regarding to arbitration ruling in his memo dated 11/27/91, addressed to D. Weinberg cc. J. Kagel, D. Mitchell and R. Kahn (Exhibit L), that the judgment of the arbitrator was not final and legally binding on him although it was binding on NEC who published its position in the company policies.

7) Five months before arbitration ruling, Plaintiff had filed a lawsuit against NEC in the Superior Court of the State of California on 6/10/91 pending arbitration proceeding. The week before that, on or about 6/3/91, Plaintiff had filed an employment discrimination complaint to the Department of Fair Employment and Housing (Exhibit I).

8) In his complaint, Plaintiff often refers to his Closing Brief at private arbitration written by his counsel, Robert Kahn, since it contains the background and pertinent facts of the case derived from substantial evidence with the support of witnesses' testimonies and exhibits. Before preparing the comprehensive closing brief, Mr. Robert Kahn had carefully reviewed all the hearing transcripts, exhibits and correspondences of the case, and discussed every aspects [sic] of the case with Plaintiff.

9) NEC attempted to conceal evidence by failing to attach the complete set of PLaintiff's complaint filed in the Superior Court of the State of California which contains Plaintiff's First Amended Complaint, Plaintiff's CLosing Brief at private arbitration, Index of Exhibits, list of Chronological Events and Plaintiff's Complaint submitted to Department of Fair

Employment and Housing, when NEC removed the case to the Federal U.S. District Court.

10) It has come to Plaintiff's surprise that the recording of his testimony on 4/3/91 at private arbitration hearing was apparently altered to make it so unintelligible that the facts are either distorted or misunderstood (Exhibit N and M). The English grammar structure of Plaintiff's recorded testimony was made so broken with strange expressions unfamiliar to Plaintiff that it sounds like Plaintiff has [sic] linguistic communication problem. Plaintiff had to edit the transcript to correct the misrecordings and clarify the facts.

11) NEC's closing brief at private arbitration contains several incorrect facts and misleading statements. Despite the facts that many parts of the testimonies of NEC's witnesses had been proven to be incorrect in the light of substantial evidence, NEC continued to take advantage of its superior economic position as a giant conglomerate Japanese company with vast financial resource to bury Plaintiff with legal paperwork based on unwarranted allegations and frivolous delay tatics.

I understand that we have to submit our Opposition to Summary Judgement by 4/17/92, 10 days before the scheduled hearing on 4/27/92 in the US District Court, in response to NEC's motion to enter the arbitration award and dismiss our complaint. Please let me know when you will have the petition package with points and authorities ready for me to review.

In the meantime, if you need additional information from me to prepare the arguments, please feel free to contact me at any time at the telephone numbers listed above. I also enclose a copy of the transcripts of the hearings on

employment discrimination in Japanese-owned companies in the U.S. held by the U.S. House of Representatives, Employment and Housing Subcommittee of the Committee on Government Operations, presided by Congressman Tom Lantos, as another supporting document to be used in court.

Respectfully Yours,
/s/ Peter Nghiem
Peter Nghiem
